Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1901

SAMUEL H. SLOAN
Petitioner,
—against—
CANADIAN JAVELIN LTD.,

AMERICAN STOCK EXCHANGE, DOW JONES & CO. INC., JOHN C. DOYLE, WILLIAM M. WISMER, LEE & MARTIN, LEE & MARTIN, STEWART PINKERTON, STANDARD & POOR'S CORP., BISON PETROLEUM & MINERALS LTD., ROBERT BENOIT MAJOR, PAVONIA, S.A., JOHN BOUCHARD, CANADA PERMANENT TRUST CO., THE MIAMI HERALD, PICKANDS, MATHER & CO., WRIGHT ENGINEERS, LTD., TECHNICAL ECONOMISTS LTD., WATTS, GRIFFIS & MCQUAT LTD., JOSEPH R. SMALLWOOD, ANGLO AMERICAN CORP., PETER JEFFREYS, INSTITUTIONAL SERVICES (DEUTSCHLAND) GMBH, ENGINEERING SERVICES, LTD., OLIVER L. VARDY, A.I.S. RESOURCES LTD., WORLD MINING, MCGRAW-HILL INC., STEVEN L. GERARD, ARTHUR FOOTE, ROBERT DE LA, RAYMOND ARONSON, BACHE & CO., INC., BOUCHARD & CO., BURNS BROS. & TIMMINS INC., CHARTERED NEW ENGLAND CORP., DAVIDSON PARTNERS LTD., DOMINICK & DOMINICK INC., DYER MAGUIRE DRITZ & CO., EDWARDS & HANLY, LOEB, RHOADES & CO., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., F. S. MOSELEY, ESTABROOK & CO., INC., MULLER & CO., OSWALD, DRINKWATER & GRAHAM, LTD., PRESSMAN, FROHLICH & FROST, INC., WEISS & BAER, INC., WOOD, WALISER & CO.,
Respondents.

BRIEF FOR RESPONDENTS CHARTERED NEW ENGLAND CORP. AND F. S. MOSELEY, ESTABROOK & CO., INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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July 26, 1976

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—against—

CANADIAN JAVELIN LTD., et al

Respondents.

BRIEF FOR RESPONDENTS CHARTERED NEW ENGLAND CORP. AND F. S. MOSELEY, ESTABROOK & CO., INC. IN OPPOSITION

The petition of Samuel H. Sloan ("Sloan") seeks review of a decision of the United States Court of Appeals for the Second Circuit (appearing at A-1a of the Appendix annexed to the petition)* dated February 6, 1976 which affirmed under Fed. R. Civ. P. 41(b) the decision of a district court to dismiss all pending complaints and seeks review of the decisions dated April 1, 1976 denying a petition for rehearing and a suggestion that the rehearing be *en banc*. (A-3a, 4a)

Questions Presented[1]

1. Whether the Court of Appeals for the Second Circuit committed error in affirming the judgment of the District Court on the grounds of Rule 41(b) of the Federal Rules of Civil Procedure?

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* References A- are to the Appendix to the petition.

[1] As Petitioner's phrasing of the questions presented is inaccurate and in part premised on speculation and matters not in the record, the respondents restate the questions pursuant to Rule 40(3) of the Supreme Court Rules.

2. Whether the District Court abused its discretion in dismissing a "fourth" untimely complaint which did not comply with the Court's order and the Federal Rules of Civil Procedure?

Counter-Statement of the Case[2]

On September 4, 1973 Sloan filed his first complaint naming Respondent Canadian Javelin, its two principal officers and six others as defendants, purportedly alleging violations of the Securities and Exchange Act of 1934. Before the return date of motions to dismiss the complaint, Sloan filed a second complaint on October 12, 1973 which included the original defendants and twenty-four additional defendants. This second complaint purported to be brought under the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules 10-b and 10(b)-5 thereunder.

On October 23, 1973 at a hearing on the motions to dismiss the first complaint, Sloan announced a third complaint was being prepared, and the District Court, Bonsal J. held the motions in abeyance, and permitted Sloan to prepare this third complaint.

In November, 1973, Sloan served the third complaint (which was never filed) bearing Civil Action numbers 73 Civ. 3801 and 73 Civ. 4403, naming thirty-two defendants. Motions to dismiss the various complaints were made. On November 19, 1973 Judge Bonsal heard argument with respect to the motions to dismiss the complaints, denied the motions without prejudice and granted Sloan permission to amend the complaint yet again, and directed that the final complaint be filed and served within twenty days, to wit, no later than December 10, 1973.

The fourth complaint was not filed or served within the prescribed period. This fourth complaint dated December

[2] As Petitioner's Statement of the Case omits the significant procedural occurrences prior to the complaint dated December 29, 1973, they are stated herein, pursuant to Rule 40(3) of the Supreme Court Rules.

29, 1973 named sixteen additional defendants for a new total of forty-eight defendants. Motions to dismiss were made[3] and a hearing was held on January 14, 1974. Despite Sloan's failure to appear at the hearing, Judge Bonsal reserved decision on the motions to dismiss and subsequently received two memoranda from Sloan in support of his complaint and in opposition to the motions.

In an eighteen page opinion (A-5a et. seq.) dated May 30, 1974, Judge Bonsal, on several grounds, dismissed all pending complaints with prejudice as to all but three defendants, and, as to those three, dismissed without prejudice. On June 11, 1974, the judgment so dismissing the complaints was entered. (A-12a)

On June 26, 1974, Sloan filed a notice of appeal. The appeal was not perfected by Sloan until over a year later, and on February 2, 1976 the appeal was argued before Circuit Judges Hays, Mulligan and Gurfein of the Court of Appeals for the Second Circuit. On February 6, 1976, the Court of Appeals affirmed the District Court holding that "Under all of the circumstances we find the dismissal to have been well within the discretion of the district court under Fed. R. Civ. P. 41(b), and so we affirm." (A-1a, 2a)

Sloan's petition for a rehearing and suggestion that the rehearing be *en banc* were denied on April 1, 1976. (A-3a, 4a)

Reasons for Denying The Writ

The decision that Sloan seeks to have this Court review represents the application of ordinary rules in an unexceptionable manner in an unusual case.

The Petition. The petition, though stating that it raises important issues which can be expected to arise frequently, admits that the "facts and circumstances present here are rather bizarre."[4] The petition, replete with rambling and

[3] Summarized in the District Court's opinion A-11a-14a.

[4] Petition at 11.

imagined allegations of denial of constitutional rights premised on the brevity of the Second Circuit's opinion, outrageous and untrue personal accusations against one of Sloan's adversaries, allegations premised on speculations outside of the record and omissions, seeks to disguise a most proper exercise of judicial discretion by the courts below, as error cognizable of this Court's review.

The only question involved herein is whether the District Court properly exercised its discretion in the admittedly "bizarre" facts and circumstances of this case. It is thus eminently clear that none of the reasons set forth in Rule 19(1) of the Supreme Court Rules for the granting of a petition for writ of certiorari are present in the petition, and the petition should be denied.

The District Court. It is well settled that a District Court has extensive discretion in dismissing a complaint for failure to prosecute. *E.g. Joseph Muller Corporation Zurich* v. *Societe Anonyme De Gerance Et D'Armement,* 508 F2d 812 (2d Cir. 1974); *Redac Project 6426 Inc.* v. *Allstate Insurance Company,* 412 F2d 1043 (2d Cir. 1969); *Schmidt* v. *Wallenuis Line,* 455 F2d 1088 (9th Cir. 1972). In exercising this discretion the District Court should consider all of the particular circumstances and the procedural history of the case. *E.g. Van Bronkhorst* v. *Safeco Corp.* 529 F2d 943 (9th Cir. 1976); *Securities and Exchange Commission* v. *Power Resources Corporation,* 495 F2d 297 (10th Cir. 1974); *Marshall* v. *Sielaff,* 492 F2d 917 (3rd Cir. 1974).

Although the Petition focuses heavily on an amended complaint dated December 29, 1973, it must be placed in its proper procedural context. In Judge Bonsal's opinion in the District Court, this complaint together with all of the facts and circumstances relevant to pending motions to dismiss, the deficiencies in the complaints, the failure of Sloan to comply with the Federal Rules of Civil Procedure and an order of the Court was carefully considered and reviewed. In this extensive opinion Judge Bonsal recites the

factors which amply demonstrate the propriety of his exercise of discretion in dismissing the complaints:

(1) the repeated service of amended or proposed complaints by Sloan, and the numerous and varied motions of the defendants to dismiss;

(2) the leave given to Sloan to file a final proper complaint within a prescribed time period;

(3) the failure of Sloan to comply with an order of the court and a consideration of Sloan's purported excuses;

(4) the failure of Sloan to appear on a motion return date;

(5) the attempt by Sloan to delay state court proceedings and the undue burden on the defendants;

(6) the experience of Sloan and his three prior opportunities to frame an adequate complaint, and the failure of the complaints to comply with the Federal Rules of Civil Procedure; and

(7) the futility in imposing a lesser sanction.

Thus, despite the myraid allegations of Sloan, it cannot be seriously maintained that the dismissal was an abuse of discretion under these particular facts and circumstances.

The Court of Appeals. Notwithstanding the imaginative conclusions of Sloan, the decision of the Court of Appeals presents no issue warranting this Court's review. The decision is not in conflict with previous decisions (e.g. *Redac Project 6426 Inc.* v. *Allstate Insurance Company,* 412 F2d 1043 (2d Cir. 1969); *Taub* v. *Hale,* 355 F2d 201 (2d Cir.) *cert. denied* 384 U.S. 1007 (1966); nor does it raise questions unresolved by this Court or conflicting with decisions of this Court (e.g. *Link* v. *Wabash,* 370 U.S. 626 (1962)); nor is the decision sanctioning a departure from

accepted and normal procedure or itself so departing (e.g. *Link* v. *Wabash,* supra; *Taub* v. *Hale,* supra).

In the Court of Appeals, the review of the dimissal under 41(b) of Fed. R. Civ. P. is limited to the question of whether the trial court abused its extensive discretion (E.g. *Marshall* v. *Sielaff,* 492 F2d 917 (3d Cir. 1974); *Redac Project 6426 Inc.* v. *Allstate Insurance Company,* 412 F2d 1043 (2d Cir. 1969), and in such review the Court should give considerable weight to the District Judge's determination, as the District Judge was in the best position to assess the circumstances. E.g. *Van Bronkhorst* v. *Safeco Corp.,* 529 F2d 943 (9th Cir. 1976).

The Court of Appeals was presented with all of Sloan's arguments,[5] both in the initial appeal and in Sloan's petition for rehearing *en banc,* and properly affirmed the decision of Judge Bonsal. The opinion of the Court of Appeals is most accurate. It concisely holds that "Under all the circumstances we find the dismissal to have been well within the discretion of the district court under Fed. R. Civ. P. 41(b), and so we affirm". (A-1a) Under this Rule the complaints could have been dismissed: a) for failure to prosecute; b) for failure to comply with the Federal Rules of Civil Procedure and c) for failure to comply with any order of the Court.[6]

We submit that in view of the particular facts of this case, where multiple grounds exist for the exercise of the

[5] The Petition at 37, in reference to the Petition for Rehearing states that "All of the arguments presented here were presented there."

[6] Sloan's argument that there was no order is frivilous. In his brief before the Court of Appeals, Sloan stated that he was "told he would have twenty days" (p. 10) and that there was a "statement of Judge Bonsal directing Sloan to file an amended complaint within twenty days" (p. 32). Futhermore Sloan cannot seriously argue that he could serve this "fourth" complaint without obtaining leave from the Court under Fed. R. Civ. P. 15(a). Thus Sloan would have this Court find the order of Judge Bonsal valid insofar as it granted leave for him to amend his complaint, but a nullity insofar as it placed any time limitation on that leave to amend.

discretion to dismiss under 41(b) Fed. R. Civ. P., where Sloan's failures were repeated, where there was full consideration of all of the circumstances below, it is beyond peradventure that the Court of Appeals was without error in holding that the District Court acted "well within" its discretion.

The Petition in its Questions Presented four through seven, merits, at most, a passing response. The *ad hominum* arguments addressed against Mr. Shannon are unfounded, incredulous and indicative of the maniac and unsuccessful search of Sloan for error below.[7]

The alleged invalidity of the Circuit Court's opinion due to its brevity and the presence of only two signatures similarly can be summarily treated. There was a full panel present at oral argument to consider Sloan's argument, and there is no requirement that all three participants sign the order.[8] *Cf* 28 USC § 46(d); *United States* v. *Allied Stevedoring,* 241 F2d 925, 927 (2d Cir.) *cert denied* 353 U.S. 984 (1957); *Tobin* v. *Ramey,* 206 F2d 505 (5th Cir.) *cert denied* 346 U.S. 925 (1953). All of Sloan's arguments were again repeated, considered and rejected by the panel in Sloan's petition for rehearing, and similarly rejected by the full court in the denial of the petition for rehearing *en banc.*

[7] Upon receipt of Sloan's petition for rehearing *en banc,* and in response to Sloan's accusation therein that Mr. Shannon was not admitted to the bar of the Second Circuit, a letter was sent to the Court of Appeals enclosing a copy of Mr. Shannon's certificate of admission. Sloan received a copy of this. Ignoring this, Sloan continues in his petition herein to attack Mr. Shannon's qualifications; and further asserts that Mr. Shannon failed to identify himself. This is, of course, untrue, as the brief before the Second Circuit and a form submitted to the clerk designating counsel for argument properly identified Mr. Shannon, as Sloan recognized in part in his petition for rehearing when he stated "according to the brief for appellees, Mr. Shannon represented Chartered New England Corp." (p. 10 thereof)

[8] Sloan admits Circuit Judge Hays was present at oral argument. Petition at 9.

Conclusion

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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